

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GARY S. BURNS, an individual,

Plaintiff,

v.

JOSEPH ARSENAULT, JANE DOE  
ARSENAULT, et al,

Defendants.

Case No. C03-2870 RBL

ORDER

THIS MATTER comes on before the above-entitled Court upon Defendant Joseph Arsenault's Motion to Set Aside Default [Dkt. #150] and an Affidavit of David R. Ebel in Support of Entry of Judgment Against the Miller Defendants [Dkt. #204].

Having considered the entirety of the records and file herein, the Court finds and rules as follows:

Arsenault's Motion to Set Aside Default

On or about April 14, 2005 this Court entered an Order [Dkt. #186] rescheduling the pretrial conference and setting an evidentiary hearing on Arsenault's motion. Shortly thereafter, the Court was notified that the matter had settled as to most defendants, but not as to Mr. Arsenault. The parties also informed the Court that the motion to set aside default by Arsenault should be renoted for a later date presumably to facilitate settlement with Mr. Arsenault. The Court renoted the motion for June 24, 2005. That settlement has not been accomplished.

In this Court's Order of April 14, 2005 [Dkt. #186], the Court indicated as to Arsenault's motion to

1 set aside default, the Court would conduct an evidentiary hearing where both Mr. Arsenault and his brother,  
2 Chris Arsenault, would be present. Therefore, because this matter is still pending, the defendant Joseph  
3 Arsenault, shall inform this Court in writing on or before August 3, 2005 whether or not he still persists in his  
4 motion and whether or not he and Chris Arsenault will be present at the hearing on this motion at a date to be  
5 set by the Court.

6 Entry of Judgment Against the Miller<sup>1</sup> Defendants

7 On or about December 15, 2004 plaintiff and the Miller defendants entered into a Confidential  
8 Settlement Agreement and Mutual Release which settled the matter between them. See, Ebel Affidavit, Dkt.  
9 #204, Exh. A. That Settlement Agreement provided that if the Miller defendants did not pay the sum of  
10 \$564,000.00 on or before March 15, 2005, an event of default will have occurred. The failure to cure the  
11 default after notice results in the balance becoming due. The default occurred, notice was given, and the  
12 balance is now due and owing.

13 Defendants argue that plaintiff's acceptance of partial payment waives his right to enforce the  
14 Settlement Agreement and demand payment in full. Defendants are mistaken. The Court finds that by  
15 accepting partial payment as contemplated by the Settlement Agreement<sup>2</sup> the plaintiff has not waived the  
16 default and his right to enter the confession of judgment.

17 Therefore, plaintiff is entitled to judgment in the principal amount of \$474,000.00<sup>3</sup> plus interest at 12%  
18 per annum from March 26, 2005 until the date of this Order. Plaintiff is also entitled to his attorneys' fees and  
19 costs associated with obtaining this judgment against the Miller defendants.<sup>4</sup> Plaintiff is entitled to post  
20 judgment interest at 3.59% pursuant to 28 U.S.C. § 1961. Plaintiff shall prepare a proposed judgment  
21 reflecting this Order.

22 **IT IS SO ORDERED.**

23  
24 <sup>1</sup>Jerry Miller, Jane Doe Miller, ER Urgent Care Group, Inc., ER Urgent Care Company, Inc. and ER Urgent Care Center,  
Inc.

25 <sup>2</sup>The agreement provides "the entire unpaid principal balance, minus any payments already made pursuant to this  
26 agreement, . . ." Ebel Affidavit, Dkt. #204 Exh. A. See also, Ebel Declaration, Dkt. #209, Exh. D.

27 <sup>3</sup>This amount reflects the original settlement of \$564,000.00 less the \$90,000.00 previously paid to plaintiff.

28 <sup>4</sup>Plaintiff's counsel shall submit a detailed affidavit in support of his attorneys' fees request.

1 The Clerk shall send uncertified copies of this order to all counsel of record, and to any party appearing  
2 pro se.

3 Dated this 21<sup>st</sup> day of July, 2005.

4   
5 RONALD B. LEIGHTON  
6 UNITED STATES DISTRICT JUDGE  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28